22, 1969

IN THE PRIVY COUNCIL No. 27 of 1968

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF CEYLON
(CRIMINAL JURISDICTION)

B E T W E E N:-

RAJAPAKSE PATHIRANAGE DON JAYASENA Appellant

- and -

THE QUEEN Respondent

C A S E FOR THE APPELLANT

RECORD

1. This is an Appeal brought pursuant to Special Leave to appeal in forma pauperis dated 26th March 1968 against an Order of the Supreme Court of the Island of Ceylon dated 13th May 1966 whereby the said Court dismissed the Appeal of Your Petitioner against his conviction by the Supreme Court (Eastern Circuit) on a charge of murder. p.139

2. The Appellant was charged jointly with Kalavilage Don Piyadasa and Yapa Mudiyansalage Dissanayaka as follows:-

> "That on or about the 7th day of August 1965, at Unit 34, Rajagala Junction, Gonagolla in the division of Batticaloa within the jurisdiction of this Court, you did commit murder by causing the death of Podiappuhamy Konara Herath and that you have thereby committed an offence punishable under Section 296 of the Penal Code". p.1 and 2

3. The case came on for hearing in the Supreme Court on the 25th February 1966 before the Hon. P. Sri Skanda, Puisne Judge and Jury and on the 3rd March 1966 all three accused were found guilty and sentenced to death.

4. The Appellant and the other two accused appealed

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to the Court of Criminal Appeal and this Appeal came on for hearing before Hon. H.N.G. Fernando, Senior Puisne President and the Hon. A.W.H. Abeyesundere and the Hon. V. Manicav Asagar,
p.138 Puisne Justices on the 12th and 13th May 1966 and on the 13th May 1966 the said Court made the Order referred to in paragraph 1 hereof. The Court did not give any reasons and there is no Record thereof except for the said Order.

5. The Appellant admitted that the deceased died as a result of wounds inflicted by him on the date and at the place particularised in the charge.

6. The evidence of the Prosecution relating to the Res Gestae of the incident was given by Yapa
p.14-26 Bandaranayake Mudiyansalage Ranasinghs Yapa, who claimed to be an eye witness. According to this witness the deceased was in a shop known as Wilson's Boutique when he was violently attacked by the three accused persons, chased into the street and eventually killed. The evidence of the Appellant was that the deceased entered his carpentry shop which was only a matter of yards from Wilson's Boutique. The Appellant was there alone and the other two accused had no part in what followed. The following passage is an extract from his evidence.

"1104. Q. Did the deceased come to the carpentry shed? A. Yes.

p.71 l.15 to p.73 l.19

1105. Q. How did the deceased come? A. He came in a car and stopped the car by the side of the road.

1106. Q. In relation to your carpentry shed, where was this car halted? A. In front of my shed.

1107. Q. Can you tell His Lordship what happened thereafter? A. At the time he was coming to the carpentry shed, I was drilling a piece of wood. When I saw him coming, I got down from the work bench. He came up to me and said 'Give me the people whom you hid the other day'. If you do not do that, you can have this", and he dealt me a blow with a sword.

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1108. Q. Then what did he do? A. I had a mallet in my hand. I held the mallet up and warded the blow off.

1109. Q. When you held the mallet, what happened to the blow with the sword? A. When I held up the mallet the sword struck the mallet and got embedded in it. Then I turned and stabbed him with a weapon that I had in my hand.

Court:

1110. Q. What was that weapon? A. It was a chisel I had made at the smithy.

1111. Q. Then what happened? A. He fell down.

1112. Q. What did you do? A. I trampled his hand and took the sword. When I took the sword, he ran.

1113. Q. Then what happened? A. Having removed the mallet which had got embedded in the sword. I threw it away. I chased after the deceased and then I saw him putting his hand to his waist. I feared that he had a pistol with him. Then while he was running, I chased after him and cut him.

Court:

1114. Q. Now is this correct? The sword had got embedded in the mallet? A. Yes.

1115. Q. Then you stabbed him with the chisel? A. Yes.

1116. Q. Then you got hold of the sword? A. Yes.

1117. Q. And you struck him with the sword? A. Yes.

1118. Q. While the mallet was still stuck on to the sword? A. No.

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1119. Q. But I thought that that was what you said. You said it happened in that order?

Crown Counsel: My Lord, I think what he said was that he threw away the mallet and chased after the deceased. For the original blow the sword had got embedded in the mallet. Thereafter, he stabbed with the chisel and later removed the mallet from the sword.

Court: I see.

1120. Q. Then what happened? A. I cut him with the sword. Then I struck him again and he raised both his hands. The second blow also struck him. He then kicked me. But I did not fall. Neither did the sword fall. He then started running. I thought that he would get into Wilson's boutique and shoot me from inside. I thought that he would enter Wilson's boutique. I chased after him and cut him two or three times. He did not go to the boutique but went in the direction of the Nawagiri Aru bund. He ran a short distance and fell down. I turned and came towards the junction. Then I ran in the direction of the forest. In the direction of the Maha Oya".

7. The sole question in this Appeal is whether or not the trial Judge rightly directed the Jury on the burden of proof.

8. There was no legal argument during the trial as to what should be the burden of proof. The view of the Prosecutor and the direction of the trial Judge appears from the following passages taken from the Judgment:-

p.128 l.22-28

"When the accused sets up a defence he need not prove his defence beyond reasonable doubt. It should be on the balance of evidence. Is it more probably true than not that it is on a balance of evidence or balance of probability?

.....

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A person is entitled to defend himself against an attack by another and if he has reasonable apprehension that if he does not act in that manner he is likely to be killed or grievous hurt is likely to be caused to him, he is even entitled to kill the person who attacks him. He says here that he had reasonable apprehension. The circumstances on which he relies must be proved to your satisfaction on the balance of probability. If he leaves it in a reasonable doubt, then he would not have succeeded in the defence that he raises. p.129 l.47 to p.130 l.8

.....

Crown Counsel:

Mr. Crown Counsel, is there anything else on which I should address the jury? p.130 l.44 to p.131 l.36

Crown Counsel:

If the evidence led by the defence has created any reasonable doubt on the prosecution evidence the benefit of the doubt must be given to the accused. I do not know whether Your Lordship addressed the jury on that aspect.

Court: Mr. Chandrapal?

Mr. Chandrapal: No, my Lord.

Mr. Kamalanathan: No, my Lord.

Court to Jury: If the defence evidence is sufficient to throw a reasonable doubt on the evidence for the prosecution, then the defence would have succeeded.

Therefore, gentlemen, now you have to consider this question, was there motive for the act complained of? Was Yapa Bandara an eye-witness? Is there any reason for Yapa Bandara to give false evidence against these accused? He says that he saw these three accused acting in the manner that he described. Then has the prosecution established its case beyond reasonable doubt? Has the defence evidence thrown a reasonable

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doubt on the evidence for the prosecution ? Has the first accused on the balance of probability or on the balance of evidence succeeded in saying that he acted in the exercise of the right of private defence of his own person? If what he says is true on the balance of evidence, then he is entitled to an acquittal. But, if you are not satisfied with that, if you think that he has not established the circumstances and leaves you in reasonable doubt with regard to the circumstances, then the defence of acting in exercise of the right of private defence of his person would fail".

9. The Appellant contends that the proper direction should be in the terms of the decision in Rex v. Woolmington 1935 A.C. page 462 to the effect that the burden of proof never passes from the Prosecution to the Defence and, if at the end of the case the Jury are not satisfied beyond reasonable doubt that the accused is guilty, he is entitled to be acquitted.

10. No reasons were given by the Court of Appeal for the dismissal of the appeal, but it is to be assumed that they acted on the authority of King v. Chandrasekera which is still the governing authority in Ceylon and is in conflict with Rex. v. Woolmington. Before dealing with this decision there is set out herein the relevant provision of the Penal Code and the Evidence Ordinance and reference is made to two earlier cases which were considered in the case referred to above.

P E N A L C O D E

Chapter II

General Explanation

5. Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision shall be understood subject to the exceptions contained in Chapter IV., intituled "General Exceptions", though these exceptions are not repeated in such definition, penal provision, or illustration.

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Chapter IV

General Exceptions

69. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Of the Right of Private Defence

89. Nothing is an offence which is done in the exercise of the right of private defence.

93. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely -

Firstly - Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of the assault;

Secondly - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly - An assault with the intention of committing rape;

Fourthly - An assault with the intention of gratifying unnatural lust;

Fifthly - An assault with the intention of kidnapping or abducting;

Sixthly - An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Chapter XVI

293. Whoever causes death by doing an act with the intention of causing death, or

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with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

296. Whoever commits murder shall be punished with death.

EVIDENCE ORDINANCE

Chapter I

3. .....

A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved nor disproved.

Chapter VIII

English Law of Evidence when in Force

100. Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in this Island, such question shall be determined in accordance with the English Law of Evidence for the time being.

PART III

Production and Effect of Evidence

Chapter IX

101. Whoever desires any court to give

judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

11. The relevant Statutory Enactments applicable to Ceylon are identical to those which are applicable to India, Rangoon and Malaysia and Singapore.

12. In the case of King-Emperor v. Dampala 1 L.R. (Rangoon Series) Vol. 14 p. 666, the point of law in question was referred to the Full Court of the High Court of Rangoon under Section 429 of the Criminal Procedure Code and came on for hearing before GOODMAN ROBERTS C.J., LEASH and DUNKELEY J.J. in December 1936 and the Full Court unanimously held that decision Woolmington v. Director of Public Prosecutions applied. The following extract from the headnote briefly summarises the reasoning.

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In all criminal cases where there is a reasonable doubt as to the guilt of an accused person at the close of the whole of the evidence the accused is entitled to be acquitted.

In criminal cases the burden of proof, using the phrase in its strictest sense is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case.

When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. The meaning of s.105 of the Evidence Act is that it is not for the prosecution to examine all possible defences which might be put forward on behalf of an accused person and to prove that none of them applies. But at the conclusion of all the evidence it is incumbent upon the prosecution to have proved their case. The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal.

S.106 of the Evidence Act does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained, which the Court thinks the accused could explain, he ought therefore to be found guilty.

Stephen Seneviratne v. The King, 41 C.W.N. 65 - followed.

The decision in Woolmington v. The Director of Public Prosecutions, (1935) A.C. 462 is in no way inconsistent with the law in British India. On the contrary the

principles there laid down form a valuable guide to the correct interpretation of s.105 of the Evidence Act.

13. In the case of Emperor v. Parbhoo 1 L.R. (Allahabad Series) 1941 p.843, the identical question was referred to the Full Court of the High Court of Allahabad and came on for hearing before SIR IQBAL AHMAD, C.J., COLLISTER, ALLSOP, BAJPAI, ISMAIL, BRAUND and MULLA J.J. in September 1941. The Full Court by a majority (COLLISTER ALLSOP and BRAUND dissenting) upheld the decision of the High Court of Rangoon and held that the decision in Rex v. Woolmington applied.

14. In the case of Rex v. Chandrasekera New Law Reports (Ceylon) Vol. 44 at p.97, the point of law was considered by the Court of Criminal Appeal, Ceylon in 1942. The proceedings were by way of CASE STATED in terms of Section 355 (1) of the Criminal Procedure Code, the question being as follows:-

> "The question for decision was whether, having regard to Section 105 of the Evidence Ordinance and to the definition of "proof" in Section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied on by such accused fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.

15. The Court of Criminal Appeal, HOWARD C.J., HEARNE, SOERTZ, KEUNEMAN, WIJEYEWARDENE, JAYATILERE J.J. (de KRETSER dissenting) answered the question in the negative.

16. The leading Judgment was delivered by HOWARD C.J., who first pointed out that the point in issue had not really been argued before them because, the Attorney-General who appeared for the Prosecution also argued that the question should be answered in the affirmative. The Chief

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Justice then reviewed the two cases referred to in paragraphs 12 and 13 hereof and came to the conclusion that they were wrongly decided and that the effect of the Statutory Enactments referred to in paragraph 11 hereof was to place the burden of proof on the accused to bring his case within any of the general exceptions. He also reviewed the Malayan cases as at that date, but these authorities are no longer the governing authorities.

17. It is contended that in Singapore and Malaysia the two governing authorities are Soh Cheow Hor v. Regina 1960 M.L.J. at p.254 in the Court of Criminal Appeal of Singapore and Looi Wooi Saik v. Public Prosecutor 1962 28 M.L.J. at p. 337. In the latter case THOMSON C.J. after referring to LORD SANKEY'S opinion in the Woolmington case said, "That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of the gold".

18. The Appellant relies on the reasoning of all the Judges who have been in favour of applying the rule in Woolmington's case. In particular the Appellant relies on the reasoning of THOMSON C.J. in the following passage in the case referred to in the preceding paragraph.

> "The general exceptions and special exceptions contained in the Penal Code are specifically dealt with in section 105 which reads as follows:-
>
> > "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances".
>
> Illustration (b) refers in terms to the Defence of provocation in relation to murder and reads as follows:-

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> "A. accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control. The burden of proof is on A."

Section 105, however is not to be read in isolation but in relation to the Ordinance as a whole. In particular sections 101 and 102 provide in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. In the words of illustration (a) to section 101:

> "A. desires a Court to give judgment that B. shall be punished for a crime which A. says B. has committed. A. must prove that B. has committed the crime".

Again, section 3 differentiates between the cases where a fact is "proved" or "disproved" or "not proved". As to whether it is proved or disproved the criterion is whether or not under the circumstances of the particular case a prudent man would act upon the supposition that it exists or upon the supposition that it does not exist. Where by that criterion the fact is neither proved nor disproved it is said to be not proved.

In the case of murder where a defence such as provocation is set up there would seem to be a conflict of presumptions. On the one hand there is the presumption of innocence of the offence of murder which arises from section 101; on the other hand there is the presumption of the non-existence of provocation which arises from section 105. That conflict, however, in our view is more apparent than real, for clearly the hypothetically prudent man envisaged by section 3 would demand different standards of proof in the two cases and in so far as there was any conflict would have no doubt as to which presumption should prevail. In any event the only logical result is that the presumption of innocence must be the stronger. Where there is any reasonable doubt as to whether the accused person has brought himself within the exception of provocation that must in its turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard

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that offence as proved against him."

19. The Appellant contends that the case of King v. Chandrasekera was wrongly decided. In particular the Appellant contends that the right of private defence under Section 89 is not a General Exception within the meaning of the Penal Code and the Evidence Ordinance.

20. The Appellant humbly submits that this Appeal should be allowed and his conviction quashed for the following among other

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R E A S O N S

1. THAT the trial Judge wrongly directed the Jury on the burden of proof:

2. THAT in cases of murder, the proper direction to the Jury should always be in accordance with the decision in Rex v. Woolmington:

3. THAT in particular this direction should be given when the issue is whether or not the accused was exercising the right of private defence:

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T.O. KELLOCK

IAN BAILLIEU

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